91-526

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS NICHOLAS VINCENT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the District Court err in denying the Petitioner's Motion to Suppress on the ground that Petitioner's Consent to the Search of his residence was unlawfully obtained as a result of the coercion and deception of law enforcement officers?

PARTIES TO THE PROCEEDING:

THOMAS NICHOLAS VINCENT,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

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ASSIGNMENT OF ERROR

The District Court's denial of the Petitioner's Motion to suppress violates the provisions of the Fourth Amendment to the United States Constitution which secures the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

CONSTITUTION PROVISION INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no WARRANTS shall be issued, but from a probable cause, supported by OATH or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Pursuant to a criminal complaint filed by Ms. Cynthia L. Meres, a special agent with the Drug Enforcement Administration, (App. 4-5) the Petitioner was arrested in Winston-Salem, North Carolina, on October 17, 1989 under a Federal Warrant which charged him with willfully, unlawfully, and intentionally possessing with intent to manufacture approximately 120 marijuana plants in violation of 21 U.S.C. 812. (App. 2,6)[1]

On October 20. 1989, the United States Grand Jury for the Middle District of North Carolina returned a two-count indictment charging the Petitioner with violating 21 U.S.C. 841(a)(1) and (b)(1)(B)(viii). (App. 2, 7-8) Count One of the Indictment alleged

[1]The Defendant's wife, Lisa, was arrested as well, but the charges against her were subsequently voluntarily dismissed by the Government with leave of Court. (App. 42-43)

that the Petitioner willfully, knowingly and intentionally manufactured marijuana unlawfully by growing and cultivating a quantity of marijuana, approximately 120 marijuana plants, a Schedule I non-narcotic controlled substance as defined by 21 U.S.C. 812. Count Two of the Indictment alleged that the Petitioner had willfully, knowingly and intentionally possessed with intent to distribute approximately 120 marijuana plants, as well as an additional 60 pounds of marijuana.

On November 6, 1989, the Petitioner was arraigned before The Honorable N. Carlton Tilley, Jr., United States District Court Judge for the Middle District of North Carolina, sitting in Winston-Salem. (App. 2) The Petitioner entered pleas of not guilty to both counts of the Indictment.

On November 15, 1989, the Petitioner

filed a motion to suppress evidence obtained as a result of a search on October 17, 1989, of his home located at 210 N. Sunset Drive, in Winston-Salem, North Carolina. (App. 2, 9-12) The Petitioner argued that the search was illegal on the ground that his consent to the procedure has been procured through the use of coercion and deception by law enforcement officers. In its response, the Government argued that the Petitioner's consent had been a free and voluntary decision on his part. (App. 13-17)

On December 8, 1989, the Petitioner's motion to suppress came on for hearing before The Honorable Richard C. Erwin, Chief United States District Court Judge for the Middle District of North Carolina, sitting in Winston-Salem. (App. 2, 18-102) After conducting a full evidentiary hearing, the Court denied the Petitioner's motion. (App.

2, 99, 139-142)

On January 3, 1990, the Petitioner appeared before Judge Erwin in Winston-Salem for the purpose of effecting a change of plea. (App. 2, 103-134) Pursuant to a Plea Agreement, the Petitioner entered a conditional plea of guilty to Count One of the Indictment, and the Government agreed that it would not oppose a Motion to Dismiss Count Two of the Indictment. (App. 2, 103-119, 135-138) In the Plea Agreement, the Petitioner expressly reserved the right to appeal from the Court's adverse ruling on the Motion to Suppress. (App. 137)

On May 11, 1990, the Petitioner appeared before Judge Erwin in Winston-Salem for sentencing. At that time, the Court sentenced the Petitioner to a term of sixty (60) months imprisonment, a term of supervised release of four (4) years, and a special assessment of

fifty dollars ($50.00). (App. 3, 143-145) Execution of the Judgment was stayed, pending appeal by the Petitioner to the United States Court of Appeals for the Fourth Circuit of the District Court's denial of the Motion to suppress. (App. 3, 144)

Oral notice of appeal was entered at the time of sentencing by counsel for the Petitioner. (App. 150) However, written notice of appeal was not filed until June 8, 1990. (App. 3, 149) At that time, the Petitioner, pursuant to the provisions of Rule 4(d) of the Federal Rules of Appellate Procedure, moved for entry of an order extending the time within which to file notice of appeal. (App. 3, 147-148) On June 11, 1990, the District Court entered an order allowing the late filing of the notice of appeal. (App. 150-151)

On February 20, 1991, a panel of the

United States Court of Appeals for the Fourth Circuit affirmed the judgment of the District Court in an unpublished opinion.

STATEMENT OF THE FACTS

At the hearing of the Motion to Suppress, the Government offered the testimony of Steven G. Porter, Senior Agent with the North Carolina State Bureau of Investigation. (App. 23-57) According to Agent Porter, on October 17, 1989, he went to the residence of Petitioner located at 210 N. Sunset Drive, Winston-Salem, North Carolina, accompanied by officers of the Winston-Salem Police Department. Upon arriving at the home at approximately 10:30 a.m., Agent Porter and Detective Russell Taylor of the Winston-Salem Police Department went to the front door of the dwelling. (App. 25) Both officers were wearing police identification jackets and bullet-proof vests. (App. 26) When the Petitioner came to the door, the officers identified themselves and displayed their credentials. (App. 25) Thereupon, the

Petitioner agreed to talk with the officers, and he invited them into a small office located next to the front door. The Petitioner was told that the authorities has received information "that implements for cultivating marijuana plants were on the premises." (App. 26) The agents asked the Petitioner for his permission to search the premises for the items described to him. (Id.) The Petitioner responded by asking questions concerning the source of the information. (App. 26-28) The Petitioner went on to say that he would show the officers what they were looking for provided that he was given the name of the person who supplied the information. (App. 27-28) In addition, the Petitioner asked if he was going to be arrested and taken out of the house in handcuffs. (App. 27) Agent Porter told the Petitioner that the District Attorney would be

informed of his cooperation and that the Magistrate would be advised that the Petitioner ought to be allowed to be released on his own recognizance. (App. 27-28) During the course of this conversation, the officers told the Petitioner that, while they did not have a search warrant, they would apply for one. (App. 37-38) However, they told the Petitioner that they would prefer having his cooperation in searching the dwelling. (App. 38)

The officers proceeded to tell the Petitioner that an individual by the name of Fred Gregory had supplied the authorities with information that a number of individuals had purchased grow lights and that two (2) order for such lights had been shipped to the residence. (App. 38-39)

Upon hearing this information, the Petitioner led the officers through the house

and down the stairs to the basement. (app. 28-29) The defendant took the officers through two doors to a small room where he showed them a grow light which had a number of plants growing under it. (App. 30) In another room, the officers found additional growing marijuana plants. (App. 31) The officers informed the defendant that the "size of the operation was a lot larger than (they had) "anticipated" and that they were going to leave the residence, after securing the premises, in order to obtain a search warrant. (Id.) A total of 172 growing marijuana plants, as well as approximately sixty pounds of stems, green vegetable matter, and dried marijuana were seized. (App. 31-32) In addition, the officers found growing containers, fertilizer, several books about growing marijuana, fans, grow lights, humidifiers, and blowers. (App. 32)

A search warrant for the house was subsequently obtained from a judge of the Superior Court Division of the General Court of Justice of the State of North Carolina. (App. 33)

At no time was the defendant advised of his Miranda rights. (App. 48-49) The agent admitted that the officers had no information about the Petitioner's activities other than the fact that Mr. Gregory had indicated that the defendant had purchased two grow lights. (App. 50)

At the hearing on the Motion to Suppress, the Petitioner testified in his own behalf. (App. 57-58) According to the defendant, Officers Porter and Taylor came to his home at approximately 10:30 a.m. on October 17, 1989. After being told that the officers had reliable information that he was growing marijuana in the house, he invited them into

the office which he maintained in connection with his real estate business. (App. 58)

According to the Petitioner,

> I was a little stunned -- I was absolutely not expecting it. So I sat down and thought about it for a few minutes; and they said that if I were to cooperate, they could recommend leniency to me; and that by saving them the trouble they would make it as easy as possible for me. I considered it, and they said that they did have probable cause and used those specific words . . . SBI Agent Porter stated that they had probable cause; that I could save them the trouble and the paperwork by consenting, and that it would be to my advantage.

(Id.)

The Petitioner further stated that,

> I was specifically told that if I did not cooperate, one would remain in the office there with me while the other went to get a search warrant . . . Mr. Porter stated that if I cooperated that he would tell me what information -- what the probable cause was, and that I would indeed be 100% satisfied, and he used those specific words -- 100% satisfied that they had every reason to be there and that they would have no trouble obtaining a search

warrant.

(App. 59-60) The Petitioner proceeded to tell the agents that he would consent to a search of the house provided that he was told the basis for the search and provided further that his wife would not be arrested. (App. 60-61) Upon receiving these assurances, the Petitioner led the agents through the house to the basement where he showed them the growing operation which he had established. (App. 61)

At the hearing, the Petitioner called as a witness, Detective Russell W. Taylor of the Winston-Salem Police Department. Detective Taylor accompanied Agent Porter to the Petitioner's residence on the morning of October 17, 1989. According to Detective Taylor, the officers had "good information" that the Petitioner was growing marijuana in the dwelling. (App. 82) The Detective conceded that, based upon his prior experience

in law enforcement, it would have been doubtful that a search warrant could have been procured for the residence based solely upon the fact that the Petitioner had purchased grow lights which could be sued in the cultivation of marijuana. (App. 86) The detective further conceded that no one had advised the defendant of his Miranda rights. (App. 91)

Even though the defendant entered a conditional plea of guilty to one of the offenses charged in the indictment, the Government established a factual basis for the plea as required by the provisions of Rule 11(f) of the Federal Rules of Criminal Procedure. (App. 2, 123-130) At the direction of the Court, the Assistant United States Attorney tendered Agent Porter as a witness. (App. 122-130) According to Agent Porter, the search of the Petitioner's

residence yielded 172 growing marijuana plants, as well as a quantity of marijuana which had been harvested. (App. 125-126)

ARGUMENT

The District Court Erred in Denying the Petitioner's Motion to Suppress on the Ground that the Petitioner's Consent to the Search of his Residence was Unlawfully Obtained as a Result of the Coercion and Deception of the Law Enforcement Officers.

In his Motion to Suppress, the Petitioner argued that the search of his residence on October 17, 1989, by law enforcement officers was illegal on the ground that his consent had been obtained by coercion and deception. (App. 9-11, 22-23, 96-97) In its response, the Government took the position that because the officers conducting the search did not mislead the Petitioner concerning their identity or purpose, the consent to the search was adequate. (App. 13-17, 98). In its memorandum and order the District Court concluded that the Petitioner's consent to the search had been freely and voluntarily given. (App. 139-142)

On February 20, 1991, a panel of the

United States Court of Appeals for the Fourth Circuit, in an unpublished opinion held that the District Court did not err in crediting the testimony of the officers in finding that such testimony established at the Petitioner's consent was freely and voluntarily given. United States of America vs. Thomas Nicholas Vincent, No. 5671 (February 20, 1991).

It is respectfully contended by the Petitioner that careful consideration of the issue of the voluntary nature of his consent to the search of his residence will establish, as a matter of law, that it had been procured through the coercion and deception of law enforcement officers.[2]

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2 The Assistant United States Attorney conceded that the fulcrum of the Government's case against the Petitioner was the search of the residence and the contraband which it produced. (App. 108-109) Resolution of the challenge of the legality of the search will, therefore, resolve the entire case in favor of the Petitioner.

It is well-established that a search conducted pursuant to a valid consent is constitutionally permissible. Schneckloth vs. Bustamonte, 412 U.S. 218, 93 S.Ct. 241, 36 L.Ed.2d 854 (1973); Bumper vs. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); see generally W. LaFave, Searches and Seizures, Section 8.1(a) to (c) (2nd ed. 1987); United States vs. Carter, 569 F.2d 801 (4th Cir.), cert. denied, 435 U.S. 973 (1977).

In Bumper, the Defendant, who lived with his grandmother, had been convicted of the crime of rape. Two days after the offense allegedly occurred, but prior to the Defendant's arrest, four law enforcement officers went to the grandmother's home, which was located in a rural area at the end of an isolated mile-long dirt road. The grandmother met the officers at the front door, and one of

them announced, "I have a search warrant to search your house." The grandmother responded, "Go ahead," and she opened the door. In the kitchen of the dwelling, the officers found a rifle that was later introduced into evidence at the Defendant's trial after a Motion to Suppress had been denied. At the hearing on the Motion to Suppress, the prosecutor informed the Court that he did not rely on a warrant to justify the search, but upon the consent of the grandmother. Speaking for the Court, Mr. Justice Stewart observed:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant cannot later be justified on the basis of consent if it turns out

> that the warrant was invalid. The results can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist a search. The situation is instinct with coercion -- albeit lawful coercion. Where there is coercion, there cannot be consent.

391 U.S. at 548-550, 88 S.Ct. at 1792. Under the analysis employed in Bumper vs. North Carolina, the talisman for any inquiry by a Court, when the validity of consent to a search has been challenged, is whether the authorization was freely and voluntarily given. See generally Schneckloth vs. Bustamonte, supra.

In Schneckloth, the Defendant had been convicted of possessing a check with intent to defraud. At trial, the Defendant moved to

suppress the introduction of three stolen checks, which had been found under the left-rear seat of an automobile in which the Defendant had been riding. After the car had been stopped by a police officer, one of the individuals who had been riding in the car, who had explained that the car belonged to his brother, was asked by the officer if the vehicle could be searched. In reply, the individual stated, "Sure, go ahead."

The trial judge denied the Motion to Suppress, and the checks in question were admitted in evidence at Bustamonte's trial. The California Court of Appeals and the Supreme Court of California upheld the Defendant's conviction. However, the United States Court of Appeals for the 9th Circuit reversed the Federal District Court's denial of a Writ of Habeas Corpus. After granting a Writ of Certiorari, the Supreme Court of the

United States reversed. Speaking for the Court, Mr. Justice Stewart noted:

> . . . "Voluntariness" has reflected an accommodation of the complex of values implicated in police questioning as a tool for the effective enforcement of criminal laws. . . . . without such investigation, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as na instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice . . . then
>
> . . . the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was implied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. . . .
>
> The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of

> official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true of confessions, the requirement of a "voluntary" consent reflects a fair accommodation of the Constitutional requirements involved. In examining all the surrounding circumstance to determine if, in fact, the consent to search was coerced, questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are a product of police coercion can thus be filtered out without undermining the continuing validity of consent searches.

412 U.S. at 225-226, 228-229, 93 S.Ct. at _____.

Schneckloth vs. Bustamonte stands for the proposition that, in determining the voluntariness of consent to a search, a Court must apprise all the facts and circumstances surrounding the giving of such consent. See generally, Weintreb, "Generalities of the

Fourth Amendment," 42 U.Chi. L. Rev. 47 (1974); compare LaFave, supra Section 8.1 (a). In any event, a claim of valid consent to a search of a residence by law enforcement officers must be measured by judicially declared standards in order to safeguard the essential purpose of the Fourth Amendment. Thompson vs. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984), rh'g denied, 469 U.S. 17, 105 S. Ct. 981, 83 L.Ed.2d 983 (1985).

It is clear, in order to validate a suspect's consent to a search, whether of his person or of his premises, the prosecution necessarily bears the burden of establishing that consent to the search was freely and voluntarily given, without any coercion on the part of the law enforcement authorities. In fact, it is clear that consent to a search which is obtained through any significant

coercion is invalid, as a matter of law, to support a subsequent search for purposes of Fourth Amendment analysis. United States vs. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

It must not be forgotten that, in the present case, the petitioner was confronted, in his home, by law enforcement officers wearing police identification jackets and bullet-proof vests. While the officers asked the petitioner's permission to search his residence, they went on to say that they could apply to a court for a search warrant. (App. 36, 82) Even though the petitioner had not been formally charged, it is manifest that he was not free to leave after the officers first arrived. (App. 61-62) The petitioner's subjective perception was confirmed by the testimony of Agent Porter that petitioner was no longer free to leave after he showed the

officers where the marijuana was growing. (App. 33)[3]

In fact, after Agent Porter and Detective Taylor left the premises in order to secure a search warrant, several officers remained in the residence with the petitioner. (App. 46-47) However, the analysis of the situation ought not to stop with the overt display of official authority and force. The testimony of the officers makes clear that they told the petitioner that they had a sufficient basis to justify a search of the premises and that he could make it easier on him if he would consent. A private citizen, when confronted with such a representation of this, together with a display of official physical authority,

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3 The testimony of Agent Porter that he did not tell the Petitioner that an agent would remain with him while another secured a search warrant if he did not cooperate is simply incredible on its fact.

could not possibly have made a free and voluntary decision to give consent to a search of his residence. See generally Bumper vs. North Carolina, supra.

A complete analysis of the validity of the petitioner's consent to the search of his home must not stop with a question of coercion. Instead, a full and complete understanding of the situation requires that careful attention be given to the issue of deception on the part of law enforcement officers which would have effectively overwhelmed the ability of an individual to make a free and voluntary decision with regard to the question of giving consent to a search.

It is well-established that trickery, fraud or misrepresentation on the part of law enforcement officers will serve the undermined voluntariness of any consent to a search. See generally Bumper vs. North Carolina, supra.

In considering the effect of deception on the voluntary character of an individual's consent to a search, the court must consider the totality of circumstances surrounding the challenged search. United States vs. Turpin, 707 F.2d 332 (8th Cir. 1983). Against this background, two clear aspects of deception were at work in the present case.

First, the officers stated, after obtaining entry into the petitioner's home, that they have received information in implements of cultivating marijuana on the premises. (App. 26, 58-60, 82) The clear import of whatever it was that the agent said to the petitioner was that they knew that marijuana was being cultivated at the residence, when, in fact, all the agents knew that two grow lights had been shipped to the address. (App. 38-39) If the information of the officers was as strong as the petitioner

had been led to believe it was, the officers clearly could have sought to secure a warrant prior to going to the residence. Instead, they chose to go to the petitioner's home and lead him to believe that they knew far more than they actually did. Otherwise, the action of the officers in leaving the residence for the purpose of procuring a search warrant after the fact makes no sense at all. This course of conduct makes it clear that the officers were attempting to validate their prior action with regard to the search. Furthermore, the officers conceded at the hearing on the motion to suppress that they did not have any information other than that which indicated that two grow lights had been shipped to the petitioner's address. Such lights can be used for many lawful purposes, and they are not inherently unlawful contraband. Therefore, the mere fact that

petitioner had purchased such grow lights could not have supported a finding of probable cause in order to obtain a search warrant. However, by misrepresenting the extent of their information, the officers deprived the petitioner of any meaningful opportunity to freely and voluntarily decide the question of consent. The officers, knowing how weak their evidence was, sought to obtain the petitioner's consent for the sole purpose of bootstrapping their investigation.

Second, the petitioner was obviously concerned and worried about his wife. (App. 60-61, 63) The officers recognized this, and they led him to believe that they were interested in his activities rather than those of his wife. (App. 34, 36, 44-45) All of this lulled the petitioner into a false sense of security with regard to the agents' intentions. (App. 61)

In United States vs. Bolen, 514 F.2d 554 (7th Cir. 1975), the defendant was convicted of knowingly and intentionally using a communication facility to facilitate the importation of cocaine. Prior to trial, the defendant moved to suppress three letters from South America which were discovered in a search of his home. The Government contended that the letters were admissible because of the defendant's written consent to search. The defendant argued, however, that his consent was not freely given but was a result of coercion and threats. In the defendant's sworn affidavit accompanying his motion to suppress the evidence of the letters found in his home, he stated that he had been advised that if consent were not give to a search of the home,t he authorities would arrest his girlfriend. In holding that the District Court erred in denying the defendant's motion

to suppress, the panel noted:

> While [the officer's] testimony about the statement concerning arrest of the girlfriend is phrased in the language of promise, there was no question that it was in fact an implied threat that if the consent were not signed, the woman would be arrested. Defendant's affidavit makes it evident that he understood the statement as a threat. The Supreme Court has held that the Constitution requires that "a consent not be coerced, by explicit or implicit means, but implied threat or covert force." . . . Where consent is given in response to such an implied threat, the consent cannot be considered voluntary.

514 F.2d at 560. While the holding of United States vs. Bolen is couched in terms of coercion, it is no less applicable to circumstances which suggest deception, particularly when such deception is attended by displays of official force. The testimony of the law enforcement officers in the case at bar makes it manifest that they communicated a lack of interest in arresting the Defendant's

wife to him. Yet, she was subsequently taken into custody, and the defendant was directed by the officers to telephone her and direct her to return home so that she could be taken into custody. (App. 62-63) It is evidence that in the present case, elements of coercion and deception converge in one set of factual circumstances in such a way and to such a degree that it cannot be said that the defendant's consent was freely and voluntarily given. Careful, yet comprehensive, analysis of this situation will establish that the District Court erred in denying the Petitioner's motion to suppress.

When the decision of the Court of Appeals is viewed in the context of all of the facts and circumstances surrounding the search of the petitioner's residence, it is clear that the decision is inconsistent with the holding and spirit of Bumper vs. North Carolina. The

petitioner is not contending that the statement of the officers that they could go and apply for a warrant was, by itself, coercive. Instead, the totality of the circumstances makes it clear that the decision of the District Court was clearly erroneous and must be reversed.

CONCLUSION

Based upon the foregoing discussion, it is respectfully contended by the petitioner that this court issue its writ of certiorari to the United States Court of Appeals for the Fourth Circuit for the purpose of allowing review of this cause.

This the 22 day of April, 1991.

David F. Tamer
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Winston-Salem, NC 27103
(919) 760-1273

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an attorney at law licensed to practice in the State of North Carolina, is an attorney for the Petitioner and is a person of such age and discretion as to be competent to serve process.

That on the 22ND day of April, 1991, he served a copy of the foregoing Writ of Certiorari by placing said copy in a first class post-paid envelope addressed as stated below, which is the last known address.

ADDRESSEE:

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 90-5671

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS NICHOLAS VINCENT,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem. Richard C. Erwin, Chief District Judge. (CR-89-247-WS)

Argued: Dec. 6, 1990 Decided: Feb. 20, 1991

Before WIDENER and CHAPMAN, Circuit Judges, and NORTON, United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: David Robert Tanis, Winston-Salem, North Carolina for Appellant. Richard S. Glaser, Jr., Assistant United States Attorney, Greensboro, North Carolina, for Appellee. ON BRIEF: David F. Tamer, Winston-Salem, North Carolina, for Appellant. Robert H. Edmunds, Jr., United States Attorney, Benjamin H. White, Jr., Assistant United States Attorney, Charles P. Francis, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36-5 and 36.6.

PER CURIAM:

Thomas Nicholas Vincent appeals his conviction based upon a contest of the district court's order denying his motion to suppress evidence obtained during a search of his residence. We find no error in the district court's decision that the defendant voluntarily consented to the search in

questions and affirm.

The evidence which the defendant seeks to suppress was obtained on October 17, 1989 by officers of the North Carolina State Bureau of Investigation and the Winston-Salem Police Department. At approximately 10:30 a.m. on that date, Senior Agent Steven G. Porter and Detective Russell Taylor arrived at the front door of the defendant's residence in Winston-Salem and identified themselves when the defendant came to the door. The officers' guns were not drawn and remained out of sight at all times. The officers asked the defendant if they could speak with him and he responded by inviting them into an office located outside the house but only a few feet from the front door thereof.

The exact nature of the conversation that followed was the subject of dispute in the suppression hearing held before the district

judge. All of the parties agree, however, that following this conversation, the defendant led the officers through his house and down into the basement, where he showed them rooms of growing marijuana plants. The authorities subsequently seized over thirty-one pounds of marijuana. The defendant was arrested and indicted on one count of possessing marijuana with the intent to distribute and one count of unlawfully manufacturing marijuana in violation of 21 U.S.C. Sections 841(a)(1) and (b)(1)(B)(vii).

Following the defendant's arraignment and plea of not guilty on both counts, he filed a motion to suppress all evidence obtained as a result of the search of his residence, pursuant to Rule 12 of the Federal Rules of Criminal Procedure and the forth and fourteenth amendments to the United States Constitution. His main contention was that

the search was illegal in that it was conducted without a warrant and based on consent obtained by coercion and deception. After holding a hearing on this motion and considering testimony from the defendant and the two officers, the district court found that the defendant's consent was freely and voluntarily given. Pursuant to a plea agreement, the defendant then changed his plea to guilty on the unlawful manufacture count of the indictment and was given a sentence that included a sixty month term of imprisonment.[1] The execution of this sentence was stayed pending appeal of the court's denial of the motion to suppress.

The only question presented on this appeal concerns the voluntariness of the

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[1]We note in passing that the description of the nature of the offense in the judgment may not agree with the description of the count number therein. No issue is made of that at this time,however.

defendant's consent to the search. While a warrantless search pursuant to a valid consent is constitutionally permissible, Schneckloth vs. Bustamonte, 412 U.S. 218 (1973), the government bears the burden of proving that the defendant freely and voluntarily gave his consent to the search, "uncontaminated by any duress or coercion, actual or implied." United States vs. Morrow, 731 F.2d 233, 236 (4th Cir.), cert. denied, 467 U.S. 1230 (1984) (quoting United States vs. Vickers, 387 F.2d 703, 706 (4th Cir. 1967), cert. denied, 392 U.S. 92 (1978)).

The defendant alleges that several specific aspects of his encounter with the officers constituted coercion and deception, and thus support his contention that his consent was not freely and voluntarily given. He first argues that the two officers coerced his consent by confronting him in his own home

wearing police identification jackets and bullet-proof vests, and telling him that one officer would remain in his home if he required them to go and seek a warrant. The defendant testified that he perceived these actions as "a threat". The defendant's second argument is that his consent was obtained on the basis of the officers' "guarantee" that his wife would not be arrested if he consented to a search. The defendant alleges that this representation was not only deceptive, but also constituted an implied threat to arrest his wife if he did not consent to the search. A third argument of the defendant is that he was deceived by the officers' misrepresentation of the strength of their evidence against him and the case with which they could obtain a search warrant. More specifically, he claims that the officers told him that they knew marijuana was being grown

in his house, that they had probable cause to conduct a search, and that they would have no trouble obtaining a search warrant.

The government disputes this account and relies upon the testimony of Agent Porter and Detective Taylor to meet its burden with regard to the voluntariness of the defendant's consent. According to this testimony, the conversation in the defendant's office began with the officers informing him that they had information indicating that implements for growing marijuana and, in particular, a growing light system, were on the premises. The officers never, in their account, claimed to have probable cause and never said that one of them would remain in the defendant's home if the other had to go and seek a warrant. In fact, they viewed the defendant as free to leave or order them to do so up until the discovery of the marijuana in the basement.

The officers, according to their testimony, told the defendant that they had no search warrant and that, while they could go and apply for one, they would prefer to have his cooperation and consent. The defendant allegedly responded by inquiring as to the source of the officers' information and asking at several points, [I]f I show you what you are looking for, will you give me the name of the person or the person that provided that information to you?" Agent Porter agreed to this request.[2] The defendant, the officers further testified, then asked, "[I]f I show you what you're looking for, are you going to arrest me and take me out in handcuffs?" The officers responded that they would not handcuff him, would advise the District Attorney of his cooperation, and would request

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[2]Agent Porter testified that after the defendant showed the officers the marijuana in the basement, he did in fact tell the defendant who had provided the officers with their information.

that the magistrate judge allow him to sign his own bond.[3] Finally, the officers' testimony indicated that they made no guarantee concerning the arrest of the defendant's wife. When the defendant expressed concern about what would happen to his wife, Agent Porter responded by saying, "I'm not concerned with your wife at this time."

The conflicting testimony of the defendant and the officers was fully presented to the district court, which decided to credit the testimony of the officers that the consent was freely and voluntarily given. In cases such as this, where a judge makes a finding on the basis of oral testimony presented to him at a suppression hearing, we have been particularly cognizant of the district court's

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[3]defendant and Agent Porter testified that the defendant was not, in fact, handcuffed when he was arrested and taken from the house.

superior opportunity to observe the witnesses' demeanor and evaluate their credibility. See United States vs. Wilson, 895 F.2d 168, 172 (4th Cir. 1990). We are bound by the district court's finding unless it is shown to be clearly erroneous. See United States vs. Gordon, 895 F.2d 932, 938 (4th Cir.), cert. denied, 59 U.S.L.W. 3247 (1990); United States vs. Bethea, 598 F.2d 331, 335 (4th Cir.), cert. denied, 444 U.S. 860 (1979). With this in mind, we find no error in the district court's rejection of the defendant's factual allegations of coercion and duress.

The testimony of the two officers supported the finding that the defendant's will was not overborne in this particular case. The mere presence of the officers in the defendant's office at his own invitation did not rise to the level of coercion in the absence of other coercive words or acts. See

United States vs. Paterson, 524 F.2d 167, 178 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976). The officers in this case did not display their weapons or misrepresent the reason for their presence at the defendant's residence. They did not indicate to the defendant that he must speak with them, that he was not free to leave, or that he could not order them to do so. Indeed, he retained this freedom up until consent, furthermore, cannot be construed as an acquiescence to a claim of lawful authority, see Bumper vs. North Carolina, 391 U.S. 543 (1968), because the officers did not claim to have a warrant or probable cause to conduct a search. They merely stated that they could go and apply for a warrant, a statement that has been repeatedly found non-coercive. See a.g., United States vs. Stallings, 810 F.2d 973, 976 (10th Cir. 1987); United States vs. Raines,

536 F.2d 796, 801 (8th Cir.), cert. denied, 429 U.S. 925 (1976); United States vs. Boukater, 409 F.2d 537, 538 (5th Cir. 1969). Finally, the officers' statements disclose no promise or guarantee that the defendant's wife would not be arrested. The defendant, therefore, could not reasonably have inferred a threat of the officers' testimony and the totality of the circumstances in this case, we are of opinion that the district court's finding of fact as to voluntariness was not clearly erroneous.

We conclude, in short, that the district court did not err in crediting the testimony of the officers and in finding that this testimony established that the defendant's consent was freely and voluntarily given.

The judgment of the district court is

AFFIRMED.